

IN THE COURT OF APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs August 23, 2006

**LARRY EUGENE KOON, ET AL. v. DOROTHY V. DUKE, ET AL.**

**Appeal from the Chancery Court for Carter County**  
**No. 26282     G. Richard Johnson, Chancellor**

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**No. E2006-00008-COA-R3-CV - FILED NOVEMBER 29, 2006**

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Larry Eugene Koon and his wife, Elizabeth Ann Koon, proceeding *pro se*, filed suit against Dorothy V. Duke and Gregory Allen Oaks, seeking to invalidate (1) a warranty deed from Ms. Koon's mother – "Edna (Bare) Jesse Oaks" – to another of Ms. Oaks' daughters, the defendant Dorothy V. Duke and (2) subsequent transfers of the subject property. The trial court granted the defendants' motion to dismiss because of the plaintiffs' failure to prosecute. Plaintiffs appeal, contending that they did not know that the defendants' motion was to be considered by the trial court on August 29, 2005, the date on which the motion was heard and granted. We vacate the trial court's judgment and remand for further proceedings.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court**  
**Vacated; Case Remanded**

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Larry Eugene Koon and Elizabeth Ann Koon, appellants, *pro se*.

No appearance on behalf of the appellees, Dorothy V. Duke and Gregory Allen Oaks.

**OPINION**

**I.**

The complaint in this case was filed on April 8, 2005. The defendants, represented by counsel, filed their answer on July 27, 2005. On the same day, the defendants filed a document entitled "Motion for Summary Judgment and Motion to Dismiss." Attached to this pleading is a "Notice of Hearing," which recites as follows:

[Cameron L. Hyder, attorney] and the Defendants will appear before  
the Honorable Chancellor Richard Johnson, on the 29th of August,

2005, at 9:00 AM O'clock in the Chancery Court for Carter County at the Carter County Courthouse in Elizabethton, Tennessee for a hearing for a Motion for Summary Judgment and Motion to Dismiss.

The Notice reflects that, on July 27, 2005, a copy of same<sup>1</sup> was served by mail on the plaintiffs.

On or about<sup>2</sup> August 4, 2005, on the letterhead stationary of the "Clerk and Master, Chancery Court, Carter County Courthouse," Charlotte McKeehan, Clerk and Master, sent a memorandum addressed to the plaintiffs, which states, in pertinent part, as follows:

[The case of Larry Eugene Koon et al. vs. Dorothy V. Duke et al.] has been set for hearing on Thursday, October 27, 2005, at 9:00 a.m. at the Carter County Courthouse, 801 E. Elk Avenue, Second Floor, Elizabethton, Tennessee.

Our records do not show an attorney for you. If you wish to be heard, you will need to be present at the above time and place.

Also on or about August 4, 2005, the Clerk and Master sent the following notice to Cameron L. Hyder, attorney for the defendants:

Enclosed please find a copy of the Non-Jury Docket for the Carter County Chancery Court. The Non-Jury cases will be heard on the date(s) indicated below, at the Carter County Courthouse, Second Floor Courtroom, 801 East Elk Avenue, Elizabethton, TN.

Our records indicate you are the attorney of record for the following case(s), which is/are presently set for hearing:

\* \* \* \*

October 27, 2005	26282	[Larry Eugene Koon, et al. v. Dorothy V. Duke, et al.]
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<sup>1</sup>The certificate does not affirmatively state that a copy of the motion was also served on the plaintiffs. For the purpose of our discussion, we will assume it was.

<sup>2</sup>We say "[o]n or about" because the envelope in which this letter apparently was sent to the plaintiffs is post-marked August 3, 2005, while the memorandum is dated August 4, 2005.

On August 25, 2005, the plaintiffs, again proceeding *pro se*, filed their opposition to the defendants' pending motion. They also filed their own motion for summary judgment supported by their joint affidavit. In addition, and on the same day, they filed a pleading entitled "Motion to Strike Affirmative Defenses Tn. Civ. P. Rule 12.06."

The next document in the record is an order of the trial court reciting that the order memorializes a hearing on August 29, 2005. It will be remembered that this is the date for which the plaintiffs had been noticed by the defendants for a hearing on their motion for summary judgment and motion to dismiss. In its order, which was entered on September 19, 2005, the court recites that the plaintiffs were "called out" but that there was no answer. The order goes on to state that the plaintiffs "received appropriate notice to appear." The trial court, in the subject order, decrees that, because the plaintiffs "fail[ed] to prosecute their cause and defend Defendant's [sic] Motions," the defendants' motion to dismiss<sup>3</sup> is granted with costs taxed to the plaintiffs. Among other things, the order recites "[t]hat the Court took ample measures to assure the presence to [sic] the Plaintiffs at the hearing on August 29, 2005."

On October 3, 2005, the plaintiffs, again proceeding *pro se*, filed a pleading styled "Motion for Relief from Judgment/Order Tn. Civ. P. Rule 60.02(1)" in which they allude to (1) the defendants' notice of July 27, 2005, advising them that the defendants' motions were to be heard on August 29, 2005, and (2) the memorandum from the Clerk and Master advising, in the language of the memorandum, that "[the] above styled cause has been set for hearing on Thursday, October 27, 2005." In asking the trial court to set aside its order dismissing their complaint, the plaintiffs state the following:

Plaintiffs are of the opinion that the two notices aforementioned caused confusion, and Plaintiffs were of the opinion that the first notice was rescheduled and set for hearing by the Clerk to October 27, 2005.

On October 12, 2005, the defendants filed a response to the plaintiffs' motion for relief, which response states, in pertinent part, as follows:

That Defendants are not at fault for Plaintiff's [sic] confusion and that if the first Notice of Hearing by Defendant's [sic] Counsel had been rescheduled, Defendant's [sic] Counsel would have informed Plaintiffs properly and promptly.

By order entered December 8, 2005, the trial court refused to set aside its order dismissing the plaintiffs' complaint. This appeal followed.

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<sup>3</sup>The trial court did not reach the merits of the defendants' motion for summary judgment.

## II.

The plaintiffs, still proceeding *pro se*, argue on appeal that the trial court abused its discretion when it dismissed their complaint and when it failed to grant their motion for relief from judgment. While the plaintiffs cite Tenn. R. Civ. P. 60.02(1) as the basis for their requested relief, we construe their request for relief – coming, as it does, within 30 days of the trial court’s order of September 19, 2005 – as a request for relief pursuant to Tenn. R. Civ. P. 59. When courts interpret pleadings, they look at the substance of the documents, not their form. *Tenn. Farmers Mut. Ins. Co. v. Farmer*, 970 S.W.2d 453, 455 (Tenn. 1998); *Bemis Co., Inc. v. Hines*, 585 S.W.2d 574, 575 (Tenn. 1979).

Tenn. R. Civ. P. 59 affords relief from a judgment for mistake, inadvertence, surprise, or excusable neglect. See *Campbell v. Archer*, 555 S.W.2d 110, 112 (Tenn. 1977); *Henson v. Diehl Machines, Inc.*, 674 S.W.2d 307, 310 (Tenn. Ct. App. 1984). “Because a Rule 59 motion to set aside a judgment addresses itself to the sound discretion of the trial court, our scope of review is limited to whether the trial court abused its discretion in denying the defendant’s motion.” *Vines v. Gibson*, 54 S.W.3d 291, 292 (Tenn. Ct. App. 2001) (citing *Henson*, 674 S.W.2d at 310)).

In *Eldridge v. Eldridge*, 42 S.W.3d 82 (Tenn. 2001), the Supreme Court addressed the abuse of discretion standard thusly:

Under the abuse of discretion standard, a trial court’s ruling “will be upheld so long as reasonable minds can disagree as to [the] propriety of the decision made.” A trial court abuses its discretion only when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

*Id.* at 85 (citations omitted). A discretionary decision should be set aside “only when the decision is based on a misapplication of the controlling legal principles or on a clearly erroneous assessment of the evidence.” *Overstreet v. Shoney’s, Inc.*, 4 S.W.3d 694, 709 (Tenn. Ct. App. 1999).

## III.

“[I]t is axiomatic that all parties to litigation are entitled to receive notice of important hearings and other proceedings; due process requires it.” *Bryant v. Edwards*, 707 S.W.2d 868, 870 (Tenn. 1986). The United States Supreme Court has stated that a “fundamental requisite” of due process is the “opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L. Ed. 1363 (1914). Such an opportunity requires “timely and adequate notice.” *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L. Ed. 2d 287 (1970).

We fully recognize that the plaintiffs received a notice from the defendants advising them that the defendants’ motion for summary judgment and motion to dismiss would be heard on August

29, 2005. It is undisputed that this notice was mailed to and received by the plaintiffs. They acknowledge this in their motion seeking relief from the judgment dismissing their complaint. It is significant, however, that, *following their receipt of the defendants' notice*, the plaintiffs received – again undisputed – another notice, this one a notice from the Carter County Clerk and Master, advising them that their “cause has been set for hearing on . . . October 27, 2005.” We recognize that the notice from the Clerk and Master does not make a reference to the motion for summary judgment. Perhaps, an attorney who received these two notices would have thought to call the clerk’s office or adversary counsel to question whether the second notice pertained to the motion for summary judgment or a hearing on the merits; but the plaintiffs were proceeding *pro se* and we do not believe they can be faulted for their apparent belief that the last notice they received – the one from the court – applied to the motion for summary judgment. The court is reminded of the old military rule: when confronted with arguably conflicting orders, one is to follow the last order received. This is what these *pro se* plaintiffs did. They acted reasonably under the circumstances.

We hold that the plaintiffs’ failure to attend the hearing of August 29, 2005, was due to *excusable* neglect on their part. The record reflects that the plaintiffs – by their multiple filings – showed a sincere interest in the pursuit of their claim. Under the circumstances of this case, we hold that they did not have notice of the August 29, 2005, hearing, because they were led to reasonably believe that the second notice effectively trumped the first notice. This deficiency in the proceedings constitutes a violation of the plaintiffs’ state and federal rights to due process. The trial court abused its discretion in refusing to set aside the order of dismissal.

#### IV.

The judgment of the trial court is vacated. Costs on appeal are taxed to the defendants, Dorothy V. Duke and Gregory Allen Oaks. This case is remanded to the trial court for further proceedings.

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CHARLES D. SUSANO, JR., JUDGE